

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

BRYAN JACOBSON,
Plaintiff,

v.

WASHINGTON STATE UNIVERSITY, a
State agency, the STATE OF
WASHINGTON, and STEVEN J. HANSEN,
a married man and his marital
community,
Defendants.

No. CV-05-0092-FVS

ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT

THIS MATTER came before the Court for a hearing on the Defendants' Motion for Summary Judgment, Ct. Rec. 10, on December 18, 2006. The Plaintiff was represented by Patrick J. Kirby. The Defendants were represented by Holly A. Vance.

BACKGROUND

The Plaintiff, Bryan Jacobson, began working for Defendant Washington State University ("WSU") on April 27, 1990. During the times relevant to this action, Jacobson was the only African American employed at WSU's Public Safety Department ("the Department"). In either 1999 or 2000, he was promoted to the position of Police Sergeant.

During his employment at WSU, Jacobson allegedly spoke out against what he perceived as racial hostility and discrimination in

1 the Department. On July 18, 2000, Jacobson filed a law suit against
2 WSU, alleging racial discrimination and retaliation in violation of
3 the Washington Law Against Discrimination. The parties settled the
4 suit on March 13, 2001. The settlement agreement requires WSU to
5 provide an additional 40 hours of training in law enforcement and
6 diversity.

7 In November of 2000, WSU issued Jacobson an interest-free, non-
8 revolving credit card. The card was to be used for work-related
9 travel only. The parties dispute the point in time at which Jacobson
10 became aware of this restriction. On December 9, 2003, J.P. Morgan
11 Chase notified WSU that Jacobson's account was 90 days past due. An
12 examination of Jacobson's account revealed that he had used his travel
13 card for personal purchases totaling \$26,646.34. On June 7, 2004,
14 Defendant Steven J. Hansen, the Chief of Police for WSU's Public
15 Safety Department, discharged Jacobson on the grounds that he had used
16 his travel card inappropriately.

17 Jacobson appealed his dismissal to the Personnel Appeals Board
18 ("PAB"). The PAB held a hearing on May 17, 2005. During the
19 proceedings, Jacobson argued that he was discharged in retaliation for
20 his lawsuit against WSU and his subsequent attempt to enforce the
21 settlement agreement. In support of his retaliation claim, Jacobson
22 introduced evidence that persuaded the PAB that "there was uncertainty
23 regarding the normal practice of WSU travel card use prior to 2003,
24 and there was a common perception that it was acceptable to charge
25 personal items on the cards as long as the balance was paid."

26 On July 8, 2005, the PAB issued its Findings of Fact, Conclusions

1 of Law and Order of the Board. The PAB held that Jacobson's
2 unauthorized use of his card constituted neglect of duty and willful
3 violation of a published policy. The PAB also held that Jacobson had
4 not committed malfeasance or gross misconduct. Based on these
5 findings, the PAB concluded that the sanction of termination was too
6 severe and modified Jacobson's sanction to demotion to the position of
7 Police Officer.

8 In September of 2005, Chief Hansen took disciplinary measures
9 against four other Department employees who had made personal
10 purchases on their travel cards. Three employees received a reduction
11 in pay for a number of months, while a fourth employee received a
12 letter of reprimand. In September of 2006, Assistant Chief Scott West
13 also received a letter of reprimand.

14 On May 24, 2006, Jacobson filed the present suit, alleging six
15 causes of action: 1) retaliation in violation of Washington's Law
16 Against Discrimination ("LAD") and Title VII of the Civil Rights Act
17 of 1964 ("Title VII"); 2) wrongful discharge in violation of public
18 policy; 3) negligent retention and supervision; 4) negligent
19 infliction of emotional distress; 5) outrage; and 6) a 42 U.S.C. §
20 1983 claim alleging deprivation of civil rights. The Plaintiff seeks
21 to recover lost wages, special damages, general damages for emotional
22 distress, his costs and attorney's fees, punitive damages, and
23 prejudgment interest.

24 **DISCUSSION**

25 **I. SUBJECT MATTER JURISDICTION**

26 The Plaintiff alleges two federal causes of action and four state

1 causes of action. The Plaintiff's federal claims arise under 42
2 U.S.C. § 2000e-3 and 42 U.S.C. § 1983. This Court has jurisdiction to
3 hear these two claims pursuant to 28 U.S.C. § 1331.

4 The Court has discretion to exercise supplemental jurisdiction
5 over the Plaintiff's four state law claims pursuant to 28 U.S.C. §
6 1367. Section 1367 provides that, when a federal district court has
7 subject matter jurisdiction over a claim, the court may also grant
8 "supplemental jurisdiction over all other claims that are so related
9 to claims in the action within such original jurisdiction that they
10 form part of the same case or controversy under Article III." In this
11 case, the Plaintiff's state law claims form part of the same case or
12 controversy as the Plaintiff's Title VII and Section 1983 claims
13 because all claims are based on the Plaintiff's discharge and the
14 Defendants' treatment of other officers who similarly misused their
15 travel cards.

16 **II. APPLICABLE LAW**

17 A federal district court sitting in diversity must apply the
18 substantive law of the forum state. *Gasperini v. Center for*
19 *Humanities, Inc.*, 518 U.S. 415, 426-427, 116 S. Ct. 2211, 2219, 135 L.
20 Ed. 2d 659, 673 (1996); *Erickson v. Desert Palace, Inc.*, 942 F.2d 694,
21 695 (9th Cir 1991) (citing *Erie R.R. v. Tompkins*, 304 U.S. 64, 58
22 S.Ct. 817, 82 L. Ed. 1188 (1938)). A federal court exercising
23 supplemental jurisdiction over a state law claim must apply the law of
24 the forum state just as it would if it were sitting in diversity.
25 *Mangold v. California Pub. Utils. Comm'n*, 67 F.3d 1470 (9th Cir.
26 1995). This Court accordingly applies Washington law to the

1 Plaintiff's state law claims.

2 When called upon to determine the preclusive effect of a state
3 administrative decision, federal district courts apply state law
4 standards of res judicata.¹ *Northwest Sea Farms, Inc. v. United*
5 *States Army Corps of Eng'r*, 931 F. Supp. 1515, 1522 (W.D. Wash. 1996).
6 Federal courts give the factual findings of state agencies the same
7 preclusive effect the findings would be given in the state's own
8 courts when the agency, "acting in a judicial capacity resolves
9 disputed issues of fact properly before it which the parties have had
10 an adequate opportunity to litigate." *Univ. of Tenn. v. Elliot*, 478
11 U.S. 788, 799, 106 S. Ct. 3220, 3226, 92 L. Ed. 2d 635, 646
12 (1986) (internal quotation marks omitted); *Olson v. Morris*, 188 F.3d
13 1083, 1086 (9th Cir. 1999). As a matter of federal common law,
14 district courts also apply the law of preclusion articulated in *Elliot*
15 to an administrative agency's legal conclusions. *Wherli v. County of*
16 *Orange*, 175 F.3d 692, 694 (9th Cir. 1999).

17 **III. SUMMARY JUDGMENT STANDARD**

18 A moving party is entitled to summary judgment when there are no
19 genuine issues of material fact in dispute and the moving party is
20 entitled to judgment as a matter of law. Fed. R. Civ. P. 56; *Celotex*
21 *Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2552, 91 L. Ed.
22 2d 265, 273-274 (1986). "A material issue of fact is one that affects
23 the outcome of the litigation and requires a trial to resolve the
24

25 ¹The term "res judicata" encompasses both the doctrine of
26 claim preclusion and the doctrine of issue preclusion.
Christensen v. Grant County Hosp. Dist., 96 P.3d 957, 961 n. 3
(Wash. 2004).

1 parties' differing versions of the truth." *S.E.C. v. Seaboard Corp.*,
2 677 F.2d 1301, 1306 (9th Cir. 1982).

3 Initially, the party moving for summary judgment bears the burden
4 of showing that there are no issues of material fact for trial.
5 *Celotex*, 477 U.S. at 317. Where the moving party does not bear the
6 burden of proof at trial, it may satisfy this burden by pointing out
7 that there is insufficient evidence to support the claims of the
8 nonmoving party. *Id.* at 325.

9 If the moving party satisfies its burden, the burden then shifts
10 to the nonmoving party to show that there is an issue of material fact
11 for trial. Fed. R. Civ. P. 56(e), *Celotex*, 477 U.S. at 324. There is
12 no issue for trial "unless there is sufficient evidence favoring the
13 non-moving party for a jury to return a verdict for that party."
14 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505,
15 2511, 91 L. Ed. 2d 202, 212 (1986). Conclusory allegations alone will
16 not suffice to create an issue of material fact. *Hansen v. United*
17 *States*, 7 F.3d 137, 138 (9th Cir. 1993). Rather, the non-moving party
18 must present admissible evidence showing there is a genuine issue for
19 trial. Fed. R. Civ. Fed. R Civ. P. 56(e); *Brinson v. Linda Rose Joint*
20 *Venture*, 53 F.3d 1044, 1049 (9th Cir. 1995).

21 **V. RETALIATION UNDER THE LAW AGAINST DISCRIMINATION**

22 In order to state a prima facie case of retaliatory discharge
23 under Washington law, a plaintiff must establish three elements: 1)
24 that he or she engaged in a protected activity; 2) that he or she was
25 discharged; and 3) that "retaliation was a substantial factor behind
26 the discharge." *Vasquez v. State*, 974 P.2d 348, 353 (Wash. Ct. App.

1 1999); *Hines v. Todd Pac. Shipyards Corp.*, 112 P.3d 522, 530-31 (Wash.
2 Ct. App. 2005).

3 The Plaintiff alleges that the Defendants terminated his
4 employment in retaliation for the Plaintiff's complaints about WSU's
5 treatment of minorities and the LAD suit he filed in 2000. Complaint
6 ¶ 22. As evidence, the Plaintiff relies on his allegation that he was
7 treated more harshly than the many other Department employees who used
8 their cards for personal purchases.

9 The Defendants argue that the doctrine of collateral estoppel
10 bars the Plaintiff's retaliation claims. Collateral estoppel, also
11 referred to as "issue preclusion," bars the relitigation of a factual
12 issue that has been previously decided in a proceeding between the
13 same parties. *Christensen*, 96 P.3d at 960-61. Though frequently
14 confused with the related doctrine of claim preclusion, collateral
15 estoppel is distinct from claim preclusion in that it applies even
16 where a new cause of action has been asserted in the later proceeding.
17 *Id.*

18 Under Washington law, collateral estoppel applies when four
19 elements are present. First, the issue decided in the earlier
20 proceeding must be identical to the issue at stake in the later
21 proceeding. Second, the earlier proceeding must have concluded with a
22 judgment on the merits. Third, the party against whom collateral
23 estoppel is asserted must have been a party to the earlier proceeding.
24 Finally, the application of collateral estoppel must not work an
25 injustice on the party against whom it is asserted. *Id.* at 961. The
26 party asserting collateral estoppel bears the burden of proof. *Smith*

1 v. *State*, 144 P.3d 331 (Wash. Ct. App. 2006).

2 Collateral estoppel applies to factual findings made by state
3 administrative agencies. *Christensen*, 96. P.3d at 961. Washington
4 courts consider three additional factors before applying collateral
5 estoppel to agency findings: first, whether the agency acted within
6 its competence, second, the differences between procedures in the
7 administrative proceeding and court procedures, and third, public
8 policy considerations. *Id.* at 961-62.

9 According to the Defendants, all of the necessary factors are
10 present in the Plaintiff's retaliation claim. First, according to the
11 Defendants, the PAB determined that Jacobson was discharged because of
12 his improper use of his government credit card. Second, the PAB
13 decision resulted in a final determination on the merits. Third,
14 Jacobson was a party to the PAB proceedings. Fourth, the Defendants
15 argue that it would not be unfair to bar Jacobson's claims on the
16 basis of collateral estoppel because he took full advantage of the
17 procedures available in presenting his claim to the PAB. He also had
18 the opportunity to appeal. The Defendants do not address the three
19 additional factors that must be considered before administrative
20 findings will be given preclusive effect.

21 The Plaintiff makes four arguments in support of his position
22 that collateral estoppel does not bar his retaliation claim. First,
23 the Plaintiff argues that the issues before the PAB and those before
24 this Court are not identical. Second, the Plaintiff argues that
25 applying collateral estoppel to his retaliation claim would work an
26 injustice. Third, the Plaintiff argues that new evidence precludes

1 the application of collateral estoppel to his retaliation claim.
2 Fourth, the Plaintiff argues that the PAB was² not competent to decide
3 his retaliation claim under the LAD. The Plaintiff does not contest
4 that Jacobson was a party to the PAB proceedings or that the PAB
5 proceeding resulted in a final decision on the merits.

6 **A. Identity of Issues**

7 The Court finds that the issues before the PAB and this Court are
8 identical. Jacobson presented his retaliation argument to the PAB and
9 the PAB concluded "there is no evidence to substantiate Appellant's
10 claim that he was treated differently." Def.'s Ex. 2 ¶ 2.20. Given
11 that the Plaintiff relies upon this alleged disparate treatment to
12 prove the third element of his retaliation claim, the PAB's finding is
13 fatal to his retaliation claim.

14 Jacobson argued his retaliation claim at some length before the
15 PAB. His retaliation claim was the central theme of Mr. Kirby's
16 opening statement at the PAB hearing, as Mr. Kirby commenced and
17 concluded his opening statement with the argument, "This case is
18 simply about using a convenient opportunity to discharge a police
19 officer who has exercised his civil rights." Def.'s Ex. 3 at 44.
20 Through his cross examination of WSU witnesses, Jacobson sought to
21 prove that many other employees similarly misused their travel cards
22 and received less severe penalties. Jacobson questioned multiple
23 witnesses about the use of travel cards by other officers for personal
24 purchases, the Department's knowledge of this practice, and the

25 ²Since January 1, 2006, actions formerly appealed to the PAB
26 have been appealed to the personnel resources board. 2006-03
Wash. Reg. 70 (Feb. 1 2006).

1 disciplinary actions taken in response to travel card misuse by other
2 officers. Def.'s Ex. 3 at 183-205, 317-339.

3 The PAB considered and rejected the evidence of disparate
4 treatment. In its Order of July 8, 2005, the PAB noted that Jacobson,
5 "raise[d] the argument of retaliation based on a lawsuit he filed
6 against WSU for racial discrimination in 2000 because others who used
7 their credit cards for personal purposes were not disciplined."
8 Def.'s Ex. 2 ¶ 2.20. In its Findings of Fact, the PAB found the
9 Plaintiff's argument was unsubstantiated by the evidence, explaining,

10 Appellant never provided Chief Hansen with any names of
11 employees engaging in similar misconduct. Therefore, Chief
12 Hansen did not have direct knowledge regarding other
employees' personal use at the time he imposed Appellant's
disciplinary action.

13 *Id.*

14 **B. Injustice**

15 Under Washington law, "the injustice component is generally
16 concerned with procedural, not substantive, irregularity."
17 *Christensen*, 96 P.3d at 309. Thus, the application of collateral
18 estoppel may result in injustice when the earlier proceeding was "an
19 informal, expedited hearing with relaxed evidentiary standards." *Id.*
20 The application of collateral estoppel may also be inappropriate where
21 the relief available in the earlier proceeding was so disparate from
22 that available in the present proceeding that "a party would be
23 unlikely to have vigorously litigated the crucial issues in the first
24 forum." *Id.*

25 The Court finds that applying collateral estoppel to the
26 Plaintiff's retaliation claim would not work an injustice under

1 Washington law. As the Defendants have observed, the Plaintiff
2 enjoyed procedural protections in the PAB hearing that are similar to
3 those available in a court proceeding. The Plaintiff was represented
4 by counsel, introduced exhibits, presented testimony from witnesses,
5 and cross-examined WSU's witnesses. The Plaintiff has not suggested
6 that he lacked motivation to try his claims vigorously before the PAB
7 and the almost five hundred pages of transcript of the hearing suggest
8 that he did, in fact, pursue his claim vigorously.

9 The Plaintiff's argument that WSU presented false evidence to the
10 PAB does not demonstrate unfairness. The Plaintiff is arguing, in
11 essence, that the PAB erred in relying on WSU's evidence. As the
12 Defendant observes, if the Plaintiff wished to relitigate the PAB's
13 decision, he could have appealed the PAB's decision directly rather
14 than bringing a separate action in this Court.

15 The Plaintiff's argument that the PAB did not address the
16 knowledge of any officer other than Hansen is likewise unavailing.
17 While the PAB cited Chief Hansen's lack of direct knowledge as the
18 reason for its rejection of the Plaintiff's retaliation argument,
19 Jacobson questioned other WSU officers about their knowledge of travel
20 card misuse. Had the Plaintiff convinced the PAB that other WSU
21 personnel were aware of the widespread misuse of travel cards, the
22 PAB's factual finding on the Plaintiff's retaliation argument would
23 have been phrased differently.

24 **C. New Evidence of Disparate Treatment**

25 Persuasive authority suggests that collateral estoppel does not
26 apply to any claim based on facts that did not arise until after the

1 initial proceeding. *Shaw v. Cal Dep't of Alcoholic Beverage Control*,
2 788 F.2d 600, 606-607 (9th Cir. 1986); *Gametech Internat'l, Inc., v.*
3 *Trend Gaming Sys., LLC*, 264 F. Supp. 2d 906, 911. Based on this
4 authority, the Plaintiff argues that the disparity between his
5 termination and the disciplinary measures imposed after the PAB
6 hearing on five other employees constitutes new evidence that
7 precludes application of collateral estoppel.

8 The Court does not find this argument persuasive. Neither of the
9 decisions cited by the Plaintiff apply Washington law: *Shaw* applies
10 California law, and *Gametech* applies Arizona law. In addition, the
11 claims in *Shaw* and *Gametech* were both based on conduct that did not
12 occur until after the termination of the prior proceeding. In
13 contrast, the conduct underlying the Plaintiff's retaliation claim is
14 his discharge. The allegedly disparate treatment of the Plaintiff is
15 evidence presented for the purpose of illustrating the motive for his
16 discharge. New evidence of disparate treatment is therefore just
17 that: new evidence about conduct that has already been ruled upon.
18 Most importantly, the transcript of the PAB hearing illustrates that
19 the Plaintiff did present substantial evidence of disparate treatment
20 to the PAB. The PAB was apparently unconvinced by the evidence, and
21 it is not for this Court to question the PAB's finding.

22 4. PAB Competence to Determine Retaliation Issue

23 The PAB is generally competent to decide all employee defenses.
24 The Washington Court of Appeals has held, "the PAB has authority to
25 consider all defenses raised by an employee in an appeal of a
26 disciplinary matter, so long as the appeal is properly before the

1 PAB." *Goodman v. Employment Sec. Dep't*, 847 P.2d 29, 31 (Wash. Ct.
2 App. 1993). The Supreme Court of Washington more recently held that
3 the Public Employment Relations Commission ("PERC"), the agency
4 charged with resolving labor disputes, was "competent to decide
5 factual issues raised in unfair labor practices complaints, such as a
6 claim of discharge in retaliation for engaging in union activity."
7 *Christensen*, 96 P. 3d at 968. By analogy, it appears that the PAB, as
8 the agency formerly charged with hearing appeals from suspended
9 employees, is competent to decide factual issues concerning "any
10 properly supported defense that an employee asserts to a disciplinary
11 action." *Goodman*, at 103-04. The Washington case law the Defendants
12 rely upon does not refute this point, as it deals with the issue of
13 claim preclusion rather than issue preclusion. See *Christensen*, 96
14 P.3d at 967-968.

15 Accordingly, the Court holds that the PAB's determinations have
16 preclusive effect upon the Plaintiff's LAD claim.

17 **VII. RETALIATION UNDER TITLE VII**

18 In order to state a prima facie case of retaliatory discharge
19 under Title VII, a plaintiff must establish 1) that he or she engaged
20 in a protective activity opposing an unlawful employment practice, 2)
21 that he or she suffered an adverse employment action, and 3) the
22 existence of "a causal link between the protected activity and the
23 adverse action." *Raad v. Fairbanks N. Star Borough*, 323 F.3d 1185,
24 1196-97 (9th Cir. 2003); *Fritag v. Ayers*, 468 F.3d 528, 541 (9th Cir.
25 2006).

26 The Defendants argue that the Plaintiff's Title VII claim is

1 unavailing for two reasons. First, the Defendants argue that the
2 Title VII claim is barred by collateral estoppel for the same reasons
3 that the LAD claim is barred. Second, the Defendants argue that the
4 Plaintiff's protected activity occurred too long before his discharge
5 to establish the necessary causal link. Noting that timing is an
6 "important element" in assessing causation, the Defendants observe
7 that the Plaintiff engaged in protected conduct by filing a lawsuit in
8 2000 and filing complaints with the Center for Human Rights ("CHR") in
9 1992 and 1998.

10 **A. Collateral Estoppel**

11 Legislative intent may preclude the application of collateral
12 estoppel to causes of action created by statute. *Christensen*, 96 P.3d
13 at 964. This is the case with Title VII claims, as both the Supreme
14 Court and the Ninth Circuit have held that unreviewed factual findings
15 of administrative agencies do not have preclusive effect on court
16 actions subsequently brought under Title VII. *Elliot*, 478 U.S. at
17 795; *McInnes v. California*, 943 F.2d 1088, 1093-94 (9th Cir. 1991).
18 Accordingly, the Court holds that the Plaintiff's Title VII claim is
19 not barred by collateral estoppel.

20 **B. Insufficient Evidence of Causal Nexus**

21 In order to state a prima facie case of retaliation under Title
22 VII, an employee must prove the existence of a causal link between his
23 protected activity and his or her discharge. *Raad*, 323 F.3d at 1196-
24 97. An employee may satisfy the causal link element by introducing
25 evidence of temporal proximity between protected conduct and
26 discharge, evidence that the employer expressed opposition to employee

1 speech, or evidence that the "employer's proffered explanations for
2 the adverse employment action were false and pre-textual." *Id.* at
3 977.

4 The Defendants' suggestion that the length of time between the
5 Plaintiff's protected conduct and his discharge creates a presumption
6 against wrongful conduct is unpersuasive for two reasons. First, in
7 the cases cited by the Defendants, the plaintiffs relied upon temporal
8 proximity alone to establish causation. In the present case, the
9 Plaintiff alleges that the more lenient disciplinary actions imposed
10 on other employees who engaged in similar misconduct demonstrate that
11 his discharge was retaliatory.

12 Second, the Defendants' argument presupposes that the passage of
13 a certain amount of time negates the element of causation. The Ninth
14 Circuit has expressly rejected this sort of bright line rule:

15 There is no set time beyond which acts cannot support an
16 inference of retaliation, and there is no set time within
17 which acts necessarily support an inference of retaliation.
[. . .] the length of time, considered without regard to its
factual setting, is not enough by itself to justify a grant
of summary judgment

18 *Coszalter v. City of Salem*, 320 F.3d 968, 978 (9th Cir. 2003).

19 The Plaintiff's Title VII claim therefore survives summary
20 judgment.

21 **V. Wrongful Discharge**

22 In order to state a prima facie case of wrongful discharge in
23 violation of public policy under Washington law, the Plaintiff must
24 prove three elements.

25 The plaintiff must prove (1) the existence of a clearly
26 mandated public policy (the clarity element); (2) that
discouraging the plaintiff's conduct would jeopardize that

1 public policy (the jeopardy element); and (3) that the
2 plaintiff's public policy-linked conduct was the reason for
the dismissal (the causation element).

3 *Gaspar v. Pschastin Hi-Up Growers*, 129 P.3d 627, 630 (Wash. Ct. App.
4 2006). See also *Fosmo v. State Dept of Personnel*, 59 P.2d 105, 107
5 (Wash. Ct. App. 2002).

6 Collateral estoppel bars the Plaintiff's wrongful discharge
7 claim. As with the Plaintiff's retaliation claim, the Plaintiff
8 relies upon the more lenient treatment of other officers to prove the
9 motive underlying his discharge. The PAB's determination that the
10 Plaintiff was not treated differently precludes the Plaintiff from
11 satisfying the causation element of his wrongful discharge claim.

12 The Court is not persuaded by the Plaintiff's argument that
13 courts may not apply collateral estoppel to wrongful discharge claims
14 based on findings of the PAB. In making this argument, the Plaintiff
15 relies upon the Washington Court of Appeals' decision in *Vargas v.*
16 *State*, 65 P.3d 330 (Wash. Ct. App. 2003). The Supreme Court of
17 Washington discredited the *Vargas* opinion in *Christensen*, explaining
18 that the *Vargas* court confused the doctrine of issue preclusion with
19 that of claim preclusion. An administrative agency may be incompetent
20 to rule upon a common law tort claim and yet still be competent to
21 decide a factual issue necessary to prove an element of that tort
22 claim. 96 P.3d at 967 n.11.

23 The Court holds that the PAB's determinations have preclusive
24 effect upon the Plaintiff's wrongful discharge claim.

25 VI. SECTION 1983

26 Any person who deprives an American citizen of his or her civil

1 rights under color of law may be held liable for injuries that result
2 from the deprivation. 42 U.S.C. § 1983. The Plaintiff alleges that
3 the Defendants deprived him of his First Amendment rights by
4 discharging him in retaliation for "speaking out" against alleged
5 racial hostility and discrimination within the Department and for
6 filing the 2000 suit under the LAD. In order to prevail upon this
7 claim, the Plaintiff must prove that he engaged in protected speech,
8 that the Defendants took an adverse employment action against him, and
9 that his protected speech was a "substantial or motivating factor" for
10 the adverse employment action. *Thomas v. City of Beaverton*, 379 F.3d
11 802, 808 (9th Cir. 2004).

12 The Defendants argue that the Section 1983 claim should be
13 dismissed for three reasons. First, the Defendants argue that they
14 are absolutely immune to suit under Section 1983. Second, the
15 Defendants argue that, even if Chief Hansen is not absolutely immune
16 to suit, he is protected by qualified immunity. Finally, the
17 Defendants argue that collateral estoppel bars the Section 1983 claim.

18 **A. Absolute Immunity**

19 Neither a state agency nor a state official acting in his or her
20 official capacity is a "person" subject to a suit for damages under
21 Section 1983. *Will v. Michigan Dep't of State Police*, 491 U.S. 58,
22 64, 109 S. Ct. 2304, 2308, 105 L. Ed. 2d 45, 52 (1989); *Lapides v. Bd.*
23 *of Regents*, 535 U.S. 613, 617, 122 S. Ct. 1640, 1642, 152 L. Ed. 806,
24 811 (2002); *Bank of Lake Tahoe v. Bank of America*, 318 F.3d 914, 918
25 (9th Cir. 2003). Public universities, as state instrumentalities, are
26 likewise immune to suit under Section 1983. *Thompson v. City of Los*

1 Angeles, 885 F.2d 1439, 1442 (9th Cir. 1989). While public officials
2 enjoy immunity for actions taken in their official capacity, public
3 officials sued in their individual capacities are persons subject to
4 suit under Section 1983. *Hafer v. Melo*, 502 U.S. 21, 30, 112 S. Ct.
5 358, 363, 116 L. Ed. 2d 301, 313 (1991).

6 Both the State of Washington and WSU are absolutely immune to the
7 Plaintiff's Section 1983 claim. The Plaintiff acknowledges that WSU
8 is a "state agency." The Plaintiff is seeking to recover only
9 damages, rather than injunctive relief, from the State and WSU. The
10 Plaintiff's Section 1983 claims against the State and WSU must
11 accordingly be dismissed.

12 Chief Hansen, however, does not enjoy absolute immunity from suit
13 under Section 1983 for actions taken in his individual capacity. The
14 Defendants argue that Chief Hansen should be absolutely immune
15 because, at all times relevant to this lawsuit, he was acting in his
16 official capacity. However, the Supreme Court has explicitly rejected
17 this argument, explaining, "the phrase 'acting in their official
18 capacities' is best understood as a reference to the capacity in which
19 the state officer is sued, not the capacity in which the officer
20 inflicts the alleged injury." *Hafer*, 502 U.S. at 27. The Plaintiff
21 in the present action has named Chief Hanson in his individual
22 capacity. Chief Hansen therefore does not enjoy absolute immunity.

23 **B. Qualified Immunity**

24 Under the doctrine of qualified immunity, government officials
25 are immune from civil liability for performing discretionary functions
26 unless their actions violate "clearly established statutory or

1 constitutional rights of which a reasonable person would have known."
2 *Morgan v. Morgensen*, 465 F.3d 1041, 1044 (9th Cir. 2006) (citing *Harlow*
3 *v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396,
4 410 (1982)). Determining whether an official is entitled to qualified
5 immunity entails a two step process. First, the Court must determine
6 whether the facts alleged by the Plaintiff "show the officer's conduct
7 violated a constitutional right[.]" *Saucier v. Katz*, 533 U.S. 194,
8 201-02, 121 S. Ct. 2151, 2156, 150 L. Ed. 2d 272, 281 (2001).
9 Second, the Court must determine whether the right in question was
10 clearly established such that a reasonable officer would know his or
11 her conduct was unlawful. *Saucier*, 533 U.S. at 202; *Morgan*, 465 F.3d
12 at 1044. The Plaintiff bears the burden of proving that the right was
13 clearly established. *DiRuzza v. County of Tehama*, 206 F.3d 1304, 1313
14 (9th Cir. 2000).

15 In this case, the Plaintiff alleges that Chief Hansen discharged
16 him in retaliation for his First Amendment activities. The Defendants
17 argue that Chief Hansen is entitled to qualified immunity because he
18 considered a number of factors prior to discharging the Plaintiff and
19 several other officers agreed with him that termination was the
20 appropriate sanction for the Plaintiff's misuse of his travel card.

21 The Defendants misunderstand the standard for qualified immunity.
22 On a motion for summary judgment, the Court must assume that all
23 disputed facts will be resolved in favor of the nonmoving party.
24 *Saucier*, 533 U.S. at 201-02. Assuming, as the Plaintiff alleges, that
25 Chief Hansen discharged the Plaintiff in retaliation for his speech,
26 this action would violate the Plaintiff's First Amendment rights.

1 This satisfies the first step noted above.

2 Turning to the second step of the inquiry, the right to be free
3 from retaliation for First Amendment activities was clearly
4 established at the time Chief Hansen discharged the Plaintiff. The
5 Ninth Circuit has held, "as early as 1983, it could hardly be disputed
6 that [. . .] an individual had a clearly established right to be free
7 of intentional retaliation by government officials based upon that
8 individual's constitutionally protected expression." *Soranno's Gasco,*
9 *Inc. v. Morgan*, 874 F.2d 1310, 1319 (9th Cir. 1989). See also
10 *DiRuzza*, 206 F.3d at 1313; *Hyland v. Wonder*, 117 F.3d 405, 410 (9th
11 Cir. 1997). Accordingly, Chief Hansen is not entitled to qualified
12 immunity.

13 C. Collateral Estoppel

14 In applying the doctrine of collateral estoppel, the Court
15 considers whether the findings of the PAB preclude the Plaintiff from
16 proving any of the required elements of his Section 1983 claim. The
17 Plaintiff argues, and the Defendants do not dispute, that the
18 Plaintiff's complaints about racial discrimination and his 2000
19 lawsuit under the LAD constitute protected speech. Nor have the
20 Defendants disputed that discharging the Plaintiff constituted an
21 adverse employment action. Rather, the Defendants' argument suggests
22 that the PAB's findings preclude the Plaintiff from proving that his
23 First Amendment activities were a substantial or motivating factor in
24 his discharge.

25 The PAB premised its rejection of the Plaintiff's retaliation
26 claim on its finding that the evidence did not support the Plaintiff's

1 contention that he was treated differently from other employees who
2 similarly misused their travel cards. While the Plaintiff has not
3 explicitly indicated that his Section 1983 claim is premised upon such
4 disparate treatment, he has made the same arguments concerning the
5 application of collateral estoppel to his Section 1983 claim as he has
6 for his retaliation and wrongful discharge claims, both of which rely
7 upon the alleged disparate treatment. As the Plaintiff is precluded
8 from arguing that he was treated differently from other employees, the
9 PAB's ruling precludes him from satisfying the third element of his
10 Section 1983 claim. The Section 1983 claim must accordingly be
11 dismissed.

12 **VII. NEGLIGENT SUPERVISION AND RETENTION**

13 An employer may be held liable for the negligent hiring,
14 retention, or supervision of an employee when two elements are
15 present. First, the plaintiff must show that the employer knew, or
16 should have known by exercising ordinary care, that the employee was
17 unfit. Second, the plaintiff must show that retaining or failing to
18 supervise the employee was a proximate cause of the plaintiff's
19 injuries. *Betty Y. v. Al-hellou*, 988 P.2d 1031, 1032-33 (Wash. Ct.
20 App. 1999); *Crisman v. Pierce County Fire Prot. Dist. No. 21*, 60 P.3d
21 652, 654 (2002).

22 The Plaintiff alleges that WSU was negligent in retaining and
23 failing to investigate Chief Hansen. The Defendants argue that the
24 Plaintiff's negligent retention and supervision claim is barred by
25 collateral estoppel because the PAB found that Chief Hansen did not
26 discharge the Plaintiff for a discriminatory purpose.

1 While the Defendants' argumentation on this point is far from
2 clear, the Court finds that collateral estoppel bars the Plaintiff's
3 negligent retention and supervision claim. As explained above, the
4 Plaintiff must prove that Chief Hansen was somehow "unfit" for his
5 position in order to state a claim of negligent retention and
6 supervision. Given that the PAB's findings preclude the Plaintiff
7 from arguing that Chief Hansen treated him differently from other
8 employees, discharged him in retaliation for his First Amendment
9 conduct, or discharged him in violation of public policy, there is no
10 remaining basis for the Plaintiff's negligent supervision and
11 retention claim.³

12 **VIII. OUTRAGE**

13 The tort of outrage, also referred to as "intentional infliction
14 of emotional distress," has three elements in the state of Washington.
15 *Orin v. Barclay*, 272 F.3d 1207, 1219 (9th Cir 2001). First, the
16 plaintiff must demonstrate that the defendant engaged in "extreme and
17 outrageous" conduct. Second, the plaintiff must prove that the
18 defendant intentionally or recklessly inflicted emotional distress on
19 the plaintiff. Third, the plaintiff must prove that the defendant's
20 actions actually resulted in "severe emotional distress." *Id.*

21 The Defendants argue that the Plaintiff's outrage claim should be
22 dismissed for two reasons. First, the Defendants argue that the
23 Plaintiff's outrage claim is duplicative of the Plaintiff's civil
24

25 ³The considerations of legislative intent that exempt the
26 Plaintiff's Title VII claim from the preclusive effects of the
PAB's decision do not apply to a common law tort claim such as
negligent retention and supervision.

1 rights claims. Second, the Defendants' argue that the Plaintiff's
2 outrage claim is barred by the doctrine of claim preclusion.

3 **A. Duplication**

4 A claim is duplicative and must be dismissed under Washington
5 law when the plaintiff asserts the same factual basis for two claims.
6 Washington courts have dismissed both negligent infliction of
7 emotional distress and outrage claims as duplicative of discrimination
8 claims. See *Francom v. Costco Wholesale Corp.*, 991 P.2d 1182, 1192
9 (Wash. Ct. App. 2000) (dismissing negligent infliction of emotional
10 distress claim as duplicative of LAD claim); *Anaya v. Graham*, 950 P.2d
11 16, 596 (Wash. Ct. App. 1998) (dismissing outrage claim as
12 duplicative).

13 The Court is not persuaded that the Plaintiff's outrage claim is
14 duplicative of the Plaintiff's civil rights claims. As the Plaintiff
15 argues, the outrage claim is based on a different set of facts from
16 his retaliation and wrongful discharge claims. The Plaintiff's
17 retaliation and wrongful discharge claims are based on the Defendants'
18 decision to discharge the Plaintiff. In contrast, the Plaintiff's
19 outrage claim is based upon the Defendants' alleged failure to
20 investigate other employees. Dismissal of the Plaintiff's outrage
21 claim on the basis of retaliation is therefore inappropriate.

22 **B. Claim Preclusion**

23 The doctrine of claim preclusion bars the relitigation of claims
24 that were or should have been decided in a prior proceeding between
25 the same parties. *Roberson v. Perez*, 123 P.3d 844, 848 (Wash. 2005).
26 Claim preclusion applies not only to claims that were actually

1 litigated in a prior proceeding, but also claims that "could have been
2 raised, and in the exercise of reasonable diligence should have been
3 raised." *DeYoung v. Cenex Ltd.*, 1 P.3d 587, 591 (Wash. Ct. App.
4 2004). A claim is not barred by claim preclusion if it could not have
5 been litigated earlier. *Kelly-Hansen v. Kelly-Hansen*, 941 P.2d 1108,
6 1113-1114 (Wash. Ct. App. 1997).

7 The Defendants argue that the Plaintiff is barred from raising
8 his emotional distress claims in the present suit because he could
9 have raised them before the PAB. However, the Defendant has neither
10 explained why, nor cited to any authority indicating, that the
11 Plaintiff could have brought his emotional distress tort claims before
12 the PAB. The purpose and responsibilities of the PAB suggest that it
13 was not the appropriate forum for such tort claims. The purpose of
14 the PAB was to "provide a system of adjudication of appeals for
15 eligible state employees." Wash. Admin. Code 358-01-053. Its
16 responsibilities included hearing appeals from state employees who had
17 been "reduced, dismissed, suspended, or demoted." Wash. Admin. Code
18 35801-031. See also Wash. Rev. Code. § 41.06.170.

19 **X. NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS**

20 The tort of negligent infliction of emotional distress has five
21 elements in the state of Washington. First, the plaintiff must prove
22 the four traditional elements of negligence: "duty, breach, proximate
23 cause, and damage or injury." *Snyder v. Med. Serv. Corp.*, 35 P.3d
24 1158, 1163-64 (Wash. 2001). In addition, the plaintiff's emotional
25 distress must be "manifested by objective symptoms [. . .] susceptible
26 to medical diagnosis and proved through medical evidence." *Haubry v.*

1 *Snow*, 31 P.3d 1168, 1193 (Wash. Ct. App. 2001).

2 The Defendants argue that the Plaintiff's negligent infliction of
3 emotional distress claims should be dismissed for two reasons. First,
4 the Defendants argue that the negligent infliction of emotional
5 distress claim is duplicative of the Plaintiff's discrimination
6 claims. Second, the Defendants argue that the negligent infliction of
7 emotional distress claim is premised upon facts that are not
8 actionable in the state of Washington.

9 **A. Duplication**

10 The Court finds the Defendants' duplication argument no more
11 persuasive when it is applied to the Plaintiff's negligent infliction
12 of emotional distress claim. As with outrage, the Plaintiff's
13 negligent infliction of emotional distress claim is based upon the
14 Defendants' alleged failure to investigate other employees rather than
15 the Defendants' dismissal of the Plaintiff. Admittedly, the two sets
16 of facts underlying the Plaintiff's emotional distress claims and
17 discrimination claims are closely related. However, the Supreme Court
18 of Washington has held that a negligent infliction of emotional
19 distress claim is actionable despite being premised on facts closely
20 intertwined with those underlying a discrimination claim in the same
21 cause of action. See *Chea v. Men's Warehouse*, 85 Wash. App. 405, 407
22 (Wash. Ct. App. 1997).

23 **B. Negligent Investigation**

24 A claim for negligent infliction of emotional distress may only be
25 premised on negligent investigation when the legislature has imposed a
26 duty to investigate upon the defendant by statute. *Pettis v. State*,

1 990 P.2d 453, 456-57 (Wash. Ct. App. 1999). Washington does not
2 recognize the tort of negligent investigation outside the context of
3 child abuse investigations. *Donohue v. State*, 142 P.3d 654, 667 n. 18
4 (Wash. Ct. App. 2006). The Defendants accordingly had no general duty
5 to investigate under the common law. See *Pettis*, 990 P.2d at 457.

6 As the Defendants have argued, the Plaintiff's negligent
7 infliction of emotional distress claim is not actionable. The sole
8 basis for the Plaintiff's negligent infliction of emotional distress
9 claim is the Defendants' alleged failure to properly investigate other
10 employees. Given that the Defendants had no duty to investigate their
11 other employees, the Plaintiff can not satisfy the first element of a
12 negligence claim. His infliction of emotional distress claim must
13 therefore be dismissed.

14 **XI. LOST WAGES AS DAMAGES**

15 The Defendants argue that the Plaintiff has no legal basis for
16 seeking lost wages as damages in this lawsuit. According to the
17 Defendants, it was the PAB and not WSU that ordered the Plaintiff's
18 demotion. The Plaintiff's failure to appeal the PAB's decision should
19 therefore preclude him from seeking lost wages from the Defendants.
20 *Laymon v. Wash. Dep't of Natural Res.*, 994 P.2d 232 (Wash. Ct. App.
21 2000); *Chelan County v. Nykreim*, 52 P.3d 1 (Wash. 2002).

22 The Court is not persuaded by these arguments. In requesting lost
23 wages, the Plaintiff is challenging not the PAB's decision to demote
24 him, but the Defendants' failure to reinstate him following his
25 demotion. The Ninth Circuit has expressly recognized "discriminatory
26 failure to reinstate as a separately actionable claim" in the context

1 of the Americans with Disabilities Act. *Josephs v. Pac. Bell*, 443 F.3d
2 1050, 1060 (9th Cir. 2006). The authority from other circuits upon
3 which the Ninth Circuit relied in reaching this conclusion deals with
4 failure to reinstate under Title VII. See *EEOC v. City of Norfolk*
5 *Police Dep't*, 45 F.3d 80 (4th Cir. 1995); *Samuels v. Raytheon Corp.*,
6 934 F.2d 388 (1st Cir. 1991). The Defendant's allegedly discriminatory
7 failure to reinstate the Plaintiff thus appears to be actionable.

8 The cases cited by the Defendants are inapplicable to the present
9 case. Both *Laymon* and *Chelan County* address the necessity of
10 exhausting administrative remedies prior to challenging the actions of
11 a government agency in court. *Laymon*, 994 P. 2d at 236; *Chelan County*,
12 52 P.3d at 17. The Defendants have not raised the issue of exhaustion
13 of administrative remedies, and the Court declines to do so.

14 CONCLUSION

15 The Plaintiff's Title VII and Outrage claims may proceed to trial.
16 All other claims shall be dismissed. The Court being fully advised,

17 IT IS HEREBY ORDERED:

18 1. The Defendants' Motion for Summary Judgment, **Ct. Rec. 10**, is
19 **GRANTED IN PART AND DENIED IN PART.**

20 2. The Plaintiff's claim for Retaliation in violation of the Law
21 Against Discrimination of the State of Washington, Wash. Rev. Code §
22 49.60.210 is **DISMISSED.**

23 3. The Plaintiff's second cause of action, Wrongful Discharge in
24 Violation of Public Policy, is **DISMISSED.**

25 4. The Plaintiff's third cause of action, Negligent Retention and
26 Supervision, is **DISMISSED.**

